News

Key Win for Affirmative Action

January 19, 2011

A federal appeals court ruled Tuesday that the University of Texas is not barred from considering race in admissions even though the use of a "10 percent" plan helps the university achieve some level of diversity in its student body.

The decision -- while likely to be appealed -- is a significant victory for proponents of affirmative action in higher education because of the novel argument used, unsuccessfully, by the plaintiffs in the case. The plaintiffs focused on the requirement set by the U.S. Supreme Court that consideration of race in government programs must not only be justified but also must be "narrowly tailored." Since the University of Texas at Austin by all accounts has succeeded in attracting minority students through the 10 percent plan, the argument goes, it shouldn't need to consider race directly in admitting students who don't win slots through the 10 percent plan.

The U.S. Court of Appeals for the Fifth Circuit, in rejecting this argument, noted many flaws in the state's percent plan, which was adopted after an earlier ban on affirmative action and which provides automatic admission to any public university for those students who graduate in the top 10 percent of their high school classes. After the Supreme Court, in a 2003 decision, upheld the consideration of race by public colleges, the University of Texas resumed doing so, while still admitting students through the 10 percent plan as well.

"The Top Ten Percent Law was adopted to increase minority enrollment. That it has done, but its sweep of admissions is a polar opposite of the holistic focus upon individuals," the ruling says. "Its internal proxies for race end-run the Supreme Court's studied structure for the use of race in university admissions decisions. It casts aside testing historically relied upon, admitting many top ten percent minorities with significantly lower scores than rejected minorities and non-minorities alike. That these admitted minorities are academically able to remain in the University does not respond to the reality that the Top Ten Percent Law eliminated the consideration of test scores, and correspondingly reduced academic selectivity, to produce increased enrollment of minorities."

The decision adds that "while the Top Ten Percent Law appears to succeed in its central purpose of increasing minority enrollment, it comes at a high cost and is at best a blunt tool for securing the educational benefits that diversity is intended to achieve. We cannot fault UT's contention that the Top Ten Percent Law is plainly not the sort of workable race-neutral alternative that would be a constitutionally mandated substitute for race-conscious university admissions policies."

While the percent admissions plan, the decision says, "may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, limiting the beneficial effects of educational diversity." The decision compares the enrollments of different colleges within the University of Texas at Austin. In social work, for example, nearly a quarter of students are Latino and more than 10 percent are black. But in business, only 14 percent of students are Latino and 3 percent are black.

"It is evident that if UT is to have diverse interactions, it needs more minority students who are interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs," the decision says.

In another damning piece of evidence about the percent plan, the ruling notes a study finding that between 1996 and 2002, the plan led to an overall increase in minority enrollment at UT, but that 2002 enrollments "contained more classes with zero or one African American or Hispanic students than had the fall 1996 schedule."

Percentage plans (a few other states use them with varying cutoffs) have been popular diversity tools, and have been considered legal -- in that they apply to people of all races. But Tuesday's decision notes educational and social concerns that have been raised about them from the start.

The decision quotes Supreme Court Justice Ruth Bader Ginsburg, who wrote that "[p]ercentage plans depend for their effectiveness on continued racial segregation at the secondary school level" and "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages." The appeals court added -- in a point recently documented by researchers -- that "these plans create a strong incentive to avoid competitive educational institutions like magnet schools."

Tuesday's decision also rejects a series of other challenges to the use of affirmative action in Texas first raised in the 2008 lawsuit on behalf of a white student rejected by UT Austin. (The 10 percent plan applies throughout the state, but has been most used at that flagship campus, so much so in fact that the plan was modified in 2009, although the modifications are not at issue in the litigation.) But it was the argument about the 10 percent plan that was the new one in the case -- and the one that some legal observers said posed the greatest danger to the consideration of race in admissions at Texas.

While the appeals court unanimously upheld the Texas policies, there are parts of the decision that may be of concern to advocates for the consideration of race in admissions.

For instance, the majority decision -- written by Judge Patrick Higginbotham -- drew attention to a time limit that the Supreme Court created in *Grutter v. Bollinger*, which upheld the consideration of race in admissions decisions at public colleges and universities. (The decision was handed down in 2003.)

"*Grutter* requires that any race-conscious measures must have a 'logical end point' and be 'limited in time,' " says Tuesday's appeals court decision. "This durational requirement can be satisfied by sunset provisions or by periodic reviews to reconsider whether there are feasible race-neutral alternatives that would achieve diversity interests 'about as well.' In this respect, *Grutter* is best seen not as an unqualified endorsement of

racial preferences, but as a transient response to anemic academic diversity. As Justice [Sandra Day] O'Connor observed, 'We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.' "

Further, one of the judges in the case -- Emilio M. Garza -- filed a concurring opinion stating that the appeals court had correctly followed the *Grutter* decision, but that *Grutter* was a "misstep" that the Supreme Court should reverse.

"To the degree that state universities genuinely desire students with diverse backgrounds and experiences, race-neutral factors like specific hardships overcome, extensive travel, leadership positions held, volunteer and work experience, dedication to particular causes, and extracurricular activities, among many other variables, can be articulated with specificity in the admissions essays," Garza writes. "These markers for viewpoint diversity are far more likely to translate into enhanced classroom dialogue than a blanket presumption that race will do the same. Moreover, these markers represent the kind of life experiences that reflect industry. Race cannot. While race inevitably colors an individual's life and views, that facet of race and its impact on the individual can be described with some precision through an admissions essay."

— Scott Jaschik